



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM 35 CENTS PER NUMBER.

Editorial Board.

ROBERT A. TAFT, *President.*

MAXWELL BARUS,

RALPH O. BREWSTER,

HARVEY H. BUNDY,

EDMUND BURROUGHS,

PRESCOTT W. COOKINGHAM,

JOSEPH J. DANIELS,

E. MERRICK DODD, JR.,

OSCAR R. EWING,

JOHN W. FORD,

C. PASCAL FRANCHOT,

ARTHUR A. GAMMELL,

WILLIAM S. WARFIELD, III, *Treasurer.*

MAURICE HIRSCH,

ALLEN T. KLOTS,

VAN S. MERLE-SMITH,

ABBOT P. MILLS,

LEROY P. PERCY,

ROBERT W. PERKINS, JR.,

JAMES J. PORTER,

VINCENT STARZINGER,

WALDEMAR Q. VAN COTT,

G. TRACY VOUGHT, JR.,

BOYKIN C. WRIGHT,

FRANCIS S. WYNER.

THE SEVENTH AMENDMENT. — The Supreme Court of the United States has held in a recent decision that the Seventh Amendment¹ prevents Congress from authorizing an appellate court to enter judgment, as may be done in Pennsylvania, Massachusetts, and other states, when the trial judge has erred in failing to direct a verdict. *Slocum v. New York Life Ins. Co.*, 33 Sup. Ct. 523. Four justices dissented vigorously, pointing out that the higher court is thus prevented from rendering the same decision which it was the right and duty of the trial judge to render. A short article by Mr. John L. Thorndike in the present number of this REVIEW renders an extended discussion unnecessary here. The logical consequences of the decision, however, may go far. How does the matter stand, for example, if the jury refuses to enter a verdict properly directed by the court? The right to direct a verdict ought to carry with it the power to enforce the order;² and a statute authorizing a court to enter the verdict if the jury proves recalcitrant would seem the merest common sense. But would not such a statute according to the reasoning of this opinion violate the Seventh Amendment?

PRINCIPLES GOVERNING RECOVERY BY PARTIES TO ILLEGAL CONTRACTS. — For obvious reasons of policy the courts will not in general

¹ Art. VII. " . . . The right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

² *Curran v. Stein*, 110 Ky. 99; *Cahill v. Chicago, M. & S. P. Ry. Co.*, 74 Fed. 285.

lend their aid to the enforcement of illegal contracts.¹ The much broader doctrine is often laid down that if the parties are equally responsible for the unlawful agreement, the law will refuse to give to either any relief from the situation arising out of the contract, since *in pari delicto melior est conditio possidentis*.² If the law treated participants in illegal transactions in all respects as legal outlaws, the doctrine might do no great injustice to the parties concerned, although it would hardly promote the public peace. But the law does concern itself with illegal undertakings to the extent of validating executed transactions such as the passing of title, and of protecting titles thus acquired.³ The result is to secure to the cleverer or more fortunate wrongdoer the continued enjoyment of his unjust enrichment, and to punish the other party to an extent which may be utterly disproportionate to the magnitude of his offense.⁴ The probability of such injustice would seem, at least in the case of minor infractions of the law, clearly to outweigh any benefit which may result from the rule in the way of discouraging illegal transactions.

As a result of such considerations as these the courts, besides being rather willing to find that the parties are not really *in pari delicto*,⁵ have come to recognize several exceptions to the doctrine. At least if the illegality is not of a serious nature, either party may rescind while the illegal act is still unperformed.⁶ So, too, if the illegal contract be induced by fraud, the weight of authority is in favor of allowing rescission by one whose offense is not *malum in se*.⁷ While these limitations on the general doctrine have considerably lessened its evils, they furnish no relief in many cases in which the rule works a palpable injustice, as where all recovery is denied if property has been transferred on Sunday.⁸

¹ *Stewart v. Thayer*, 168 Mass. 519, 47 N. E. 420; *Case v. Smith*, 107 Mich. 416, 65 N. W. 279.

² *Robeson v. French*, 12 Metc. (Mass.) 24; *Shaffner v. Pinchback*, 133 Ill. 410, 24 N. E. 867. According to the English rule the maxim applies only to cases where the plaintiff cannot make out his case without the aid of the illegal transaction. *Taylor v. Chester*, L. R. 4 Q. B. 309. This formal rule has been generally repudiated in this country. *Sampson v. Shaw*, 101 Mass. 145; *Johnson v. Hulings*, 103 Pa. St. 498.

³ See *Thompson v. Williams*, 58 N. H. 248, 249. See KEENER, QUASI-CONTRACTS, 270. This doctrine is not, however, clearly established in all jurisdictions. See *Carson v. Goss*, 107 Mass. 439, 441.

⁴ See an article by Professor Wigmore in 25 AM. LAW REV. 695, 712.

⁵ Parties are held not to be *in pari delicto* where the contract is made illegal for the protection of one of them. *Brown v. McIntosh*, 39 N. J. L. 22; *Stansfield v. Kunz*, 62 Kan. 797, 64 Pac. 614. Nor where the contract is brought about by duress or any undue influence exerted by one party. *Atkinson v. Denby*, 6 H. & N. 778, 7 H. & N. 934; *Klein v. Pederson*, 65 Neb. 452, 91 N. W. 281. Voluntary participants in illegal action would seem, however, to be *in pari delicto*, notwithstanding the fact that one is more at fault than the other. See dissenting opinion of Sanborn, J., in *Stewart v. Wright*, 147 Fed. 321, 339, 340. See also WOODWARD, QUASI-CONTRACTS, § 142; 20 HARV. L. REV. 60. There is, however, authority for the contrary view. *Webb v. Fulchire*, 3 Ired. (N. C.) 485; *Lockman v. Cobb*, 77 Ark. 279, 91 S. W. 546.

⁶ *Tyler v. Carlisle*, 79 Me. 210, 9 Atl. 356; *Eastern Metal Co. v. Webb Granite Co.*, 195 Mass. 356, 81 N. E. 251. Since the object of this rule is to prevent a violation of the law if possible, the *dicta* that it does not extend to serious offenses seem unsound.

⁷ *Webb v. Fulchire*, *supra*; *National Bank & Loan Co. v. Petrie*, 189 U. S. 423, 23 Sup. Ct. 512; *American Mutual Life Ins. Co. v. Bertram*, 163 Ind. 51, 70 N. E. 258. *Contra*, *Babcock v. Thompson*, 3 Pick. (Mass.) 446; *Plaisted v. Palmer*, 63 Me. 576.

⁸ *Thompson v. Williams*, *supra*; *Myers v. Meinrath*, 101 Mass. 366.

The maxim is merely a method of expressing a consideration of policy, and the maxim is so much broader than the legitimate scope of the policy that it would be well to discard it altogether. The real question at issue is whether in any particular case the ends of the law will be furthered or defeated by granting the relief asked. That the direct enforcement of the contract is generally undesirable may be taken for granted.⁹ Furthermore, where recovery of the reasonable value of goods sold or services rendered is sought, the result of granting such relief is to assure to one who performs an unlawful agreement a right to obtain money in exchange for his services which is likely to be the chief object of his contract. This form of relief thus tends to execute the illegal agreement, and it should therefore be granted somewhat sparingly.¹⁰ If, however, the plaintiff asks merely for rescission and the restoration of property transferred without consideration, to allow him recovery will often prevent the otherwise probable execution of the contract, and in any case is a repudiation and not an execution of the contract. Under these circumstances there would seem to be in general no sufficient reason for refusing to entertain a suit based upon ordinary equitable or quasi-contractual principles such as unjust enrichment or fraud. If, however, the parties, as a result of their contract, have committed a serious crime, there is stronger reason for saying that they have forfeited all right to legal aid. A recent case which denied to a participant in a felonious marriage the recovery of property conveyed to the supposed wife who had induced the crime in order to defraud him of this property may therefore be supported.¹¹ *Szlawzis v. Szlawzis*, 255 Ill. 314, 99 N. E. 640. It would seem doubtful, however, if public policy is really served by such a decision, for the protection afforded the defrauder probably encourages him more than it frightens others. The reluctance of the courts to adjust the rights of criminals is hardly a sufficient reason for allowing clever scoundrels to defraud their victims whenever they can involve them in crime.

EFFECT OF BAD MOTIVE IN THE LAW OF TORTS. — A novel situation in a recent Massachusetts case presents in an interesting way the effect of bad motive in the law of torts. A landowner erected a large sign on her land bearing the words, "For Sale. Best Offer from Colored Family." Although intending to sell, the defendant was actuated by ill-will toward

⁹ It is permitted only in case the illegality of the contract is a mere directory provision, and in some cases where the contract is illegal only because *ultra vires*. *Larned v. Andrews*, 106 Mass. 435; *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390.

¹⁰ See KEENER, QUASI-CONTRACTS, 262; *Stewart v. Thayer*, 170 Mass. 560, 563, 49 N. E. 1020, 1022. This objection does not apply if most of the contract is still executory.

¹¹ See RECENT CASES, p. 756. Many even of the more modern cases take this view. *Knight v. Linzey*, 80 Mich. 396, 45 N. W. 337; *Schmitt v. Gibson*, 12 Cal. App. 407, 107 Pac. 571. See *Lowell v. Boston & Lowell R. Co.*, 23 Pick. (Mass.) 24, 32; *Tracy v. Talmage*, 14 N. Y. 162, 181. *Contra*, *Hobbs v. Boatright*, 195 Mo. 693, 93 S. W. 934; *Stewart v. Wright*, *supra*. The last two cases are perhaps distinguishable from the principal case, since in them there was in substance no execution of the illegal contract but merely an elaborate pretense carried out for the purpose of defrauding the plaintiff.